Supreme Court, U.S.
FILED
DEC 9 - 2010
OFFICE OF THE CLERK

No. 10-618

IN THE

Supreme Court of the United States

CITY OF NEW YORK, *et al.*,

Petitioners,

v.

METROPOLITAN TAXICAB BOARD OF TRADE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONERS

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December 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

REASONS FOR GRANTING THE WRIT 2

I. The Second Circuit's Broad Conception of "Relatedness" Is Directly Contrary to This Court's Preemption Jurisprudence and Disregards Critical Statutory Language. 4

II. The Far-Reaching Effects of the Second Circuit's Decision Do Not Reflect Any Recognizable Federal Policy and, Indeed, Conflict With Federal Policy. 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases:

Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316 (1997) 4, 5, 8

Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) 8

De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997) 5

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 5

Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) 7

Green Alliance Taxi Cab Ass'n v. King County, 2010 WL 2643369 (W.D. Wash. June 29, 2010) 8, 9

Metro. Taxicab Bd. of Trade v. City of New York, 615 F.3d 152 (2d Cir. 2010) 3, 4

N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 5, 8

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 5

Rush Prudential HMO v. Moran, 536 U.S. 355 (2002) 5

Statutes and Rules:

29 U.S.C. § 1144(a) 5

42 U.S.C. § 7543 8

49 U.S.C. § 32901(a)(6) 6

49 U.S.C. § 32919(a) 3, 6, 11

S. Ct. R. 37.2(a) 1

Other:

75 Fed. Reg. 25324 (May 7, 2010) 12

Brief for the United States as Amicus Curiae, *Metro. Taxicab Bd. of Trade v. City of New York*, No. 09-2901-CV (2d Cir. filed Jan. 15, 2010) 3, 10, 11, 12

www.afdc.energy.gov/afdc/laws/ 11

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents the interests of its members in litigation and regularly files amicus curiae briefs in cases in the United States Supreme Court and the federal appellate courts.

Among Public Citizen's particular concerns is overbroad invocation of preemption arguments to override state and local laws that seek to protect consumers, workers, and the public—including laws aimed at promoting safer, cleaner, and more economical automobiles. In many instances, as in this case, such preemption arguments reflect distortions of the policies and purposes of federal law that create a false impression of conflict between federal and state law. Often, the result of judicial acceptance of such overly broad preemption arguments would be the creation of regulatory gaps never intended by Congress, as states and local governments would be disabled from addressing problems that the federal government has

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[1] Counsel of record for the parties received timely notice of amicus curiae's intent to file this brief as required by this Court's Rule 37.2(a). Written consents to the filing of the brief from all parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

neither addressed itself nor intended to prevent the states from addressing. In some cases, including this one, the effect of preemption would be to prevent states and localities from taking actions that federal law and policy affirmatively encourage.

In addition, Public Citizen has a longstanding interest in promoting efficient use of energy and discouraging excessive consumption of gasoline and other fossil fuels, which contributes to depletion of (and higher consumer prices for) scarce natural resources and is directly linked to unhealthy levels of air pollution and the discharge of greenhouse gases. The decision of the court of appeals in this case runs counter to the broad societal interest in energy conservation and, more specifically, to the shared interest of both the federal government and state and local governments in providing incentives, through means other than prescriptive regulations, for the adoption of fuel-efficient vehicles.

REASONS FOR GRANTING THE WRIT

The City of New York, like other local governments, has long regulated taxicab service. For many years, the City had policies that encouraged and even required some cab companies to purchase cars that were relatively inefficient in their consumption of fuel. More recently, the City altered its regulations regarding lease arrangements between taxicab fleet owners and taxicab drivers to eliminate disincentives to the purchase of more efficient hybrid vehicles by fleet owners, and thus to encourage the eventual replacement of fuel-inefficient taxis by modern vehicles that use less gasoline and cause less pollution. The City acted, however, not by imposing *standards* requiring that taxicabs meet specified levels of fuel effi-

ciency, but by creating economic incentives for the purchase of hybrids.

Nonetheless, the U.S. Court of Appeals for the Second Circuit held that the City's lease rules were preempted by the Energy Policy and Conservation Act ("EPCA"), which authorizes the federal government to issue regulations requiring vehicles sold in the United States to meet mandatory average fuel economy standards and provides that a state or local government "may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." 49 U.S.C. § 32919(a). The Second Circuit reasoned that because New York's lease rules related to the "fuel economy" of New York's taxicabs, they were preempted. *See* 615 F.3d at 157-58.

By holding that any state or local law broadly related to "fuel economy" has the prohibited relationship to "fuel economy *standards*," the Second Circuit, took precisely the broad and simplistic approach to preemption that this Court has repeatedly warned against in its decisions construing similar preemption provisions, particularly ERISA's preemption clause. The result, as the United States put it in its amicus curiae brief supporting the City in the Second Circuit, is one that "it is plain that Congress did not intend." Brief for the United States as Amicus Curiae 2, *Metro. Taxicab Bd. of Trade v. City of New York*, No. 09-2901-CV (2d Cir. filed Jan. 15, 2010) ("U.S. Br."). Indeed, the Second Circuit's reasoning would broadly disable state and local governments from taking actions to create incentives for the purchase of fuel-efficient vehicles, a result Congress could not possibly

have intended and that, as the City has pointed out, itself conflicts with federal policies promoting hybrids and other fuel-efficient cars. The conflict between the Second Circuit's preemption analysis and that dictated by this Court's precedents, together with the broad potential impact of the court's reasoning, strongly counsels in favor of a grant of certiorari in this case.

I. The Second Circuit's Broad Conception of "Relatedness" Is Directly Contrary to This Court's Preemption Jurisprudence and Disregards Critical Statutory Language.

The court of appeals treated the preemption question in this case as one that required only a rote application of what the court apparently saw as clear statutory language. According to the Second Circuit, the words "related to" in EPCA's preemption clause cover all circumstances where "the challenged law contains a 'reference' to the preempted subject matter or makes the existence of the preempted subject matter 'essential to the law's operation.'" 615 F.3d at 156 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 324-25 (1997)). Because New York's taxicab lease rules affect *fuel economy*, the court went on to hold, they necessarily refer to or depend on the existence of fuel economy *standards*.

Such a broad construction of "related to" is directly contrary to this Court's repeated warnings, in the context of ERISA, that preemption provisions based on the "relatedness" of the subjects of federal and state law cannot be given such sweeping effect. Despite its early recognition of the "expansive sweep" of the ERISA provision preempting state laws that "re-

late to any employee benefit plan," 29 U.S.C. § 1144(a), *e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), this Court has emphasized that the very expansiveness of the concept of "relatedness" is a source of ambiguity and a reason to exercise caution in construing the scope of preemption. As the Court explained in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course ...." 514 U.S. 645, 655 (1995).

Thus, this Court has emphasized that the "relate to" preemption language used in ERISA (and also in EPCA) cannot be approached with "uncritical literalism." *Id.* at 656; *accord Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001); *Dillingham*, 519 U.S. at 325. Instead, the Court has repeatedly begun its analysis of the scope of ERISA preemption with the admonition that "the starting presumption that Congress does not intend to supplant state law" applies. *Travelers*, 514 U.S. at 654; *accord Rush Prudential HMO v. Moran*, 536 U.S. 355, 365 (2002); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997). And because of the indeterminacy of the statutory language, the search for the requisite clear and manifest congressional intention to supplant state law requires consideration of both "the objectives of the [federal] statute" and "the nature of the effect of state law" on the preempted subject-matter. *Dillingham*, 519 U.S. at 325 (citations omitted).

Here, the Second Circuit overlooked the surest indication of the objective of the federal statute: the law's own language. EPCA's preemption clause does

not, as the Second Circuit's reasoning suggests, apply generally to any state or local law that relates to *fuel economy*, but much more specifically to laws that are related to "*fuel economy standards or average fuel economy standards*." 49 U.S.C. § 32919(a) (emphasis added). Critically, by making preemption turn on relatedness not simply to the broad subject of "fuel economy," but to "fuel economy standards," Congress used terms of art explicitly defined in the statute: EPCA's definition section provides that "'average fuel economy standard' means a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." *Id.* § 32901(a)(6).

Congress's deliberate use of this defined term in establishing the scope of EPCA preemption makes clear that the policy it was pursuing was not broad preemption of anything relating to fuel economy. Congress had a narrower objective: protection of exclusive federal authority to establish performance standards specifying minimum fuel economy levels that automobile manufacturers must meet. Only laws that relate to such standards are preempted by EPCA.

When the focus is properly placed on whether a state or local law relates to a fuel economy *standard*, the magnitude of the Second Circuit's deviation from this Court's admonition that courts exercise caution in construing preemption clauses based on "relatedness" becomes apparent. Although the City's taxicab leasing regulations may "relate to" fuel economy, they are not themselves mandatory performance standards requiring manufacturers to achieve minimum levels of fuel economy, they do not refer to such mandatory performance standards, and mandatory performance

standards are not somehow essential to the operation of the City's rules. Indeed, the differential lease rates adopted by the City have nothing to do with such standards save that they both in some sense concern fuel efficiency. The City's rules merely affect the incentives of taxicab fleets to make voluntary purchases from among the broad range of vehicles available in the marketplace (all of which presumably satisfy applicable federal fuel efficiency standards).

This Court acknowledged the substantial difference between laws that create voluntary incentive programs and laws that are (or relate to) *standards* in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). There, the Court emphasized that the term "standard" encompasses "[a] command, accompanied by sanctions" determining the characteristics of vehicles that may permissibly be purchased or sold on the market. *Id.* at 255. Put another way, the Court identified "standards" with "criteria" with which vehicles *must* comply. *Id.* at 253. The Court disclaimed any holding that the statute at issue there (which preempted state or local enforcement of vehicle emission "standards" different from federal standards) would preempt "voluntary incentive programs." *Id.* at 258. Such programs, the Court stressed, "are significantly different from command-and-control regulation." *Id.*

Here, unlike in *South Coast*, the statute at issue actually provides an express definition of the key term on which preemption hinges—"average fuel economy standard"—and that definition underscores the distinction recognized in *South Coast* between mandatory standards and incentive programs. By ignoring the express statutory language indicating the narrowness

of the scope of preemption and instead embarking on the open-ended project of determining whether the City's rules "related to" fuel economy generally, the Second Circuit strayed far from this Court's command that in construing the scope of "relatedness" preemption clauses, courts avoid taking the statutory language to the "furthest stretch of its indeterminacy," *Travelers*, 514 U.S. at 655, and instead hold a state law preempted only when the state law runs contrary to Congress's manifest objectives. *Dillingham*, 519 U.S. at 325.

The proper analysis of EPCA's preemptive scope is exemplified by the decision in *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), addressing whether California emissions standards, which had effects on fuel economy as well, were preempted by EPCA. Consistent with the presumption against preemption and EPCA's language and objectives, the court determined that "EPCA's express preemption of state regulations *related to* mileage standards [should] be construed as narrowly as the plain language of the law permits," and that it encompassed "state regulations that are explicitly aimed at the establishment of fuel economy standards, or that are the *de facto* equivalent of mileage regulation." *Id.* at 1175.[2] Similarly, in *Green Alliance Taxi Cab Ass'n v. King County*, 2010 WL 2643369 (W.D. Wash. June 29, 2010), the court held that a program

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[2] The court also mentioned a third category of preempted regulations, not relevant here: emissions regulations that affect mileage and "that do not meet the requirements established by the Clean Air Act for waiver of preemption under [42 U.S.C. § 7543]." *Id.*

providing voluntary incentives for the purchase of hybrid vehicles by taxicab companies was not preempted because "only a mandate can be a legal regulation 'related to' fuel economy standards and thus preempted by EPCA." *Id.* at *5. The Second Circuit's decision, by contrast, cannot be squared with the preemption principles set forth in this Court's opinions or with the language of EPCA.

II. The Far-Reaching Effects of the Second Circuit's Decision Do Not Reflect Any Recognizable Federal Policy and, Indeed, Conflict With Federal Policy.

The Second Circuit's view that EPCA preempts any state or local law that affects, or reflects any concern regarding, automobile fuel economy, has remarkably broad implications. Most directly, the court's reasoning would threaten preemption of any economic regulation of the City's taxicab industry that seeks to promote energy conservation and combat air pollution by providing incentives for the purchase of hybrid or other fuel-efficient vehicles by taxicab fleets.

As the United States pointed out below, the effect of preemption in this case is to disable the City even from *removing disincentives* to hybrid vehicle purchases that are the result of the City's preexisting lease-rate regulations. Those rules effectively placed all the fuel costs attributable to the purchase of less-efficient vehicles on taxicab drivers and thus encouraged fleet owners to purchase cars that are less expensive to buy but more expensive to operate because of their relatively low gas mileage. *See* U.S. Br. 2-3. As the brief of the United States stated, "The City should not be held to have violated federal law when it

sought to modify the consequences of its earlier regulations." *Id.* at 3.

Moreover, as the United States also observed below, any economic regulation of taxicab lease rates will inevitably have some impact on fleet fuel economy, whether positive or negative. If, as the Second Circuit's reasoning suggests, any such effect has a prohibited "relation" to fuel economy standards, it is not clear what the City can permissibly do in this area (short of dismantling its entire regulatory scheme). But as the United States' brief pointed out, there is absolutely no indication that Congress ever would have intended EPCA's prohibition on meddling by states and localities with *fuel economy standards* to have such a far-reaching effect on *economic regulation of the taxicab industry*, a matter traditionally of local concern:

> Although Congressional intent cannot be determined with certainty in other settings, it is plain that Congress did not intend—by establishing regulation of average fuel economy standards and new motor vehicle emission standards—to assert general federal control over the regulation of taxi services, an area that had been the subject of pervasive local regulation for decades prior to passage of the Clean Air Act and EPCA in the 1960s and 1970s. New York City taxicab regulations have long restricted vehicle choices and equipment, with a consequent impact on the overall fuel economy and emissions of taxi fleets. And the City has also long regulated the economic relationship between taxicab fleet owners and drivers. It has never been suggested that Congress meant to preempt all such vehicle restric-

> tions and lease rate setting, and there is no clear basis for concluding that the regulations at issue in this case at issue crossed a line established by federal law.

U.S. Br. 2.

Moreover, the potential effects of the Second Circuit's decision are by no means limited to its unwarranted interference with taxicab regulation. The court's view that states and localities are preempted from taking actions that have the effect or objective of encouraging the purchase of fuel-efficient vehicles or that otherwise affect the overall fuel economy of the mix of vehicles that buyers purchase cannot logically be confined to regulation of taxicabs. After all, EPCA's preemption clause applies to laws related to fuel economy standards "*for automobiles*," not just taxicabs. 49 U.S.C. § 32919(a) (emphasis added). The Second Circuit's reasoning thus extends to any state or local law that affects fuel economy by creating incentives for the purchase of more fuel-efficient vehicles by consumers or businesses of any kind.

As the petition for certiorari explains, there are literally hundreds of state and local laws that provide such incentives. Pet. for Cert. 24-28. The federal government itself promotes such state and local efforts not only through legislation that specifically encourages them (*see id.* at 21-23), but also by, among other things, providing a comprehensive list of those incentives to allow consumers to take maximum advantage of their benefits. *See* www.afdc.energy.gov/afdc/laws/. It is nothing short of fanciful to suggest that such state and local laws interfere with EPCA's policies or fall within the scope of its preemption clause, but that

is the necessary implication of the Second Circuit's decision.

Energy conservation and combating the environmental effects of fossil-fuel consumption are critical national priorities. Increasing the use of fuel-efficient vehicles is an essential step in pursuing those priorities. Federal fuel economy standards are one means of decreasing gasoline consumption, limiting our reliance on foreign energy sources of increasingly uncertain reliability, and reducing air pollution and greenhouse gas emissions. *See* 75 Fed. Reg. 25324, 25326-27 (May 7, 2010) (establishing new corporate average fuel economy standards). Equally important, however, is encouraging vehicle buyers to select fuel-efficient vehicles from within the "range of vehicle choices" (*id.* at 25324) permitted by those standards. State and local efforts to provide such encouragement—such as the lease rules at issue in this case—complement the objectives of the federal standards without conflicting with them, referring to them or relying on them in any prohibited way, or, indeed, affecting the federal *standards* at all.

Tellingly, the federal government argued below that the City's rules and similar state and local laws do not in any way conflict with federal law or policy and that preempting such laws simply because they have an effect on fuel economy would "create a regulatory void that Congress surely did not contemplate." U.S. Br. 12. Nonetheless, the Second Circuit issued a decision that, in the guise of a wooden application of statutory language aimed at vindicating the supremacy of federal law, poses a potentially devastating threat to vital national interests in addition to interfering with the exercise of traditional powers of state

and local governments. The far-reaching negative effects of the Second Circuit's decision, together with the opinion's disregard of the teaching of this Court's decisions limiting the effect of preemption clauses using the same language at issue here, fully justify review of this important case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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